UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
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In the Matter of:

Case No. 2-CA-40128

EVENFLOW TRANSPORTATION
MANAGEMENT,

Respondent,

And

LOCAL 713 INTERNATIONAL BROTHERHOOD
TRADE UNIONS,

Charging Party.
----------X

RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

SCOTT P. TRIVELLA, ESQ.
DENISE A. FORTE, ESQ.
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On August 30, 2011, Administrative Law Judge Raymond Green (hereinafter referred to as "ALJ") issued a Decision and Recommended Order finding that the Respondent Evenflow Transportation, Inc. (hereinafter referred to as "Respondent" or "Evenflow") violated Sections 8(a)(1), 8(a)(3), 2(6) and 2(7) of the National Relations Labor Act.

Respondent hereby excepts to the ALJ's Findings and Recommended Order.

STATEMENT OF EXCEPTIONS

I. Jurisdiction

None

A) Alleged Unfair Labor Practices

1. The ALJ erred in finding that Julie Bizzaro, wife to John Bizzaro, was "to a larger extent" responsible for Evenflow's bookkeeping. (ALJD at 2, lines 18-19).

2. The ALJ erred in finding that two dispatchers "assisted" with Evenflow's day to day operations. (ALJD at 2, lines 21-22).

3. The ALJ erred in finding that Evenflow dispatchers, Leandro DeSilva and Antonio Cabrera acted as a liaison between management and the drivers and were "directly" involved in the hiring of new employees. (ALJD at 2, lines 25-27).

4. The ALJ erred in ruling that Leandro DeSilva and Antonio Cabrera were supervisors and/or agents of the Respondent, as defined in Section 2(11) and 2(13) of the Act. (ALJD at 2, lines 27-28).

5. The ALJ erred in finding that the Respondent "merged" with a company called "Osiris." (ALJD at 2, line 33).

6. The ALJ erred in finding that the two dispatchers employed by Evenflow "directed" the work of the drivers. (ALJD at 2, lines 46-48).

7. The ALJ erred in finding that dispatcher Antonio Cabrera was “aware” and “overheard” that a Union representative was talking to the Respondent’s employees. (ALJD at 3, lines 22-25).

8. The ALJ erred in ruling that Mr. Cabrera was a supervisor or agent whose “knowledge” of the Union campaigning should be imputed upon the Respondent. (ALJD at 3, lines 25-27).

9. The ALJ erred in finding that Mr. Bizzaro “interrogated” various employees about the Union campaigning during the summer of 2010. (ALJD at 3, lines 29-31).

10. The ALJ erred in finding that Anthony Smidth “credibly” testified that Mr. Cabrera “asked” him about Union campaigning and then “told” him that Mr. Bizzaro wanted to speak with him. (ALJD at 3, lines 33-38).

11. The ALJ erred in finding that Mr. Smidth “credibly” testified about a conversation with Mr. Bizzaro where there was questioning relating to Union campaigning. (ALJD at 3, lines 36-39).

12. The ALJ erred in finding that Nelson Rodriguez “credibly” testified about Mr. Bizzaro questioning him about, and advising against, the Union campaigning. (ALJD at 3, lines 40-45; at 4, lines 1-5).

13. The ALJ erred in finding that Julio Castro “credibly” testified about Mr. Bizzaro questioning him about Union campaigning and threatening to “bring his dogs out.” (ALJD at 4, lines 6-20).

14. The ALJ erred in finding that a late wage payment in early September 2010 was the cause of the employees arranging to meet with a Union organizer. (ALJD at 4, lines 21-25).

15. The ALJ erred in finding that the Respondent “conceded” that none of the employees would have been laid off or discharged. (ALJD at 5, lines 2-3).

16. The ALJ erred in finding that Mr. Bizzaro gave a “different” reason for selecting the employees for lay-offs. (ALJD at 5, lines 5-10).

17. The ALJ erred in finding that the Respondent had a “sudden realization” that it “might” owe a substantial amount of money to the Internal Revenue Service. (ALJD at 5, lines 14-15).

18. The ALJ erred in ruling that the tax levy imposed by the Internal Revenue Service is “analogous to a garnishment on money” owed to the Respondent. (ALJD at 5, lines 16-17).

19. The ALJ erred in finding that the reasons for CCM’s late payments was “largely” a result of the Respondent’s computer “failing” to generate proper invoices. (ALJD at 5, lines 24-27).

20. The ALJ erred in finding that a letter dated June 3, 2010 was sent to Cheryl Davenport of CCM which “stated in substance that Evenflow couldn’t carry such a large balance and continue to provide the best service.” (ALJD at 5, lines 29-31).

21. The ALJ erred in finding that the monies owed by CCM was “not a situation where long overdue payments are typically a prelude to non-payment.” (ALJD at 5, lines 36-37).

22. The ALJ erred in finding that payments to the Respondent for CCM services would be paid directly from Medicaid. (ALJD at 5, lines 39-40).

23. The ALJ erred in finding that the Respondent hired two new employees in June 2010. (ALJD at 5, lines 44-45).

24. The ALJ erred in ruling that the Respondent failed to fully comply with the Counsel for the General Counsel’s demand for payroll records. (ALJD at 5, lines 46-51).

25. The ALJ erred in finding that the IRS Notice of Levy served upon Neighborhood Health Providers LLC was “apparently similar to a garnishment.” (ALJD at 6, lines 4-7).

26. The ALJ erred in finding that there was “no” evidence that any of the Respondent’s other customers were required to pay money to the IRS. (ALJD at 6, lines 10-11).

27. The ALJ erred in finding that there was “no” evidence presented to show that the tax levy had “any substantial affect” on the Respondent’s business. (ALJD at 6, lines 11-14).

28. The ALJ erred in finding that no evidence was produced to show that the amounts owed to and diverted from the Respondent comprised a significant portion of its business. (ALJD at 6, lines 15-16).

29. The ALJ erred in finding that the outstanding monies owed by CCM was withheld “mostly through the fault of the Respondent.” (ALJD at 6, lines 21-22).

30. The ALJ erred in finding that the evidence supported that Evenflow hired two drivers after learning of its financial problems. (ALJD at 6, lines 24-27).

31. The ALJ erred in ruling that the decision to lay off the employees was not made until September 2010. (ALJD at 6, lines 27-28).

32. The ALJ erred in ruling that the Respondent laid off the employees “after” it became “aware that the Union had restarted its organizing campaign in or about August 2010.” (ALJD at 6, lines 28-31).

33. The ALJ erred in finding that the Respondent had knowledge of the Union’s restarting of an organizing campaign. (ALJD at 6, lines 34-35).

34. The ALJ erred in finding that Mr. Bizzaro expressed anti-Union animus. (ALJD at 6, lines 35-36).

35. The ALJ erred in finding that the timing of the “terminations” was consistent with an anti-union motivation. (ALJD at 6, lines 36-37).

36. The ALJ erred in ruling that the Counsel for the General Counsel established a prima facie case. (ALJD at 6, lines 37-38).

37. The ALJ erred in finding that the Respondent failed to comply with the Counsel for the General Counsel’s subpoena for documents relating to the IRS claims. (ALJD at 6, lines 45-48).

38. The ALJ erred in finding that Mr. Cabrera had no knowledge of monies being owed to the Respondent. (ALJD at 6, lines 50-51).

39. The ALJ erred in ruling that the Respondent failed to meet its burden. (ALJD at 7, lines 2-3).

40. The ALJ erred in ruling that the lay-offs of the employees violated Section 8(a)(1) and 8(a)(3) of the Act. (ALJD at 7, lines 2-4).

III. Conclusions of Law

41. The ALJ erred in ruling that the Respondent illegally interrogated the employees regarding Union activity and in violation of Section 8(a)(1) of the Act. (ALJD at 7, lines 5-9).

42. The ALJ erred in ruling that the Respondent "threatened" the employees with "physical harm" in retaliation of Union activity and in violation of Section 8(a)(1) of the Act. (ALJD at 7, lines 10-12).

43. The ALJ erred in ruling that the Respondent's discharge of the employees was due to their Union activity and in violation of Section 8(a)(1) and 8(a)(3) of the Act. (ALJD at 7, lines 14-15).

44. The ALJ erred in ruling that the Respondent committed an unfair labor practice and violated Section 2(6) and 2(7) of the Act. (ALJD at 7, lines 17-18).

IV. Remedy

45. The ALJ erred in finding that the Respondent's actions warrant a cease and desist order. (ALJD at 7, lines 21-24).

46. The ALJ erred in finding that the Respondent "must" offer the employees reinstatement and back pay for "discriminatorily" discharging them. (ALJD at 7, lines 25-27).

V. Order

47. The ALJ erred in finding that the Respondent must cease and desist from interrogating its employees about Union activity and sympathies. (ALJD at 7, lines 40-43).

48. The ALJ erred in finding that the Respondent must cease and desist from "asking" its employees to report Union activities and supporters. (ALJD at 7, lines 44-45).

49. The ALJ erred in finding that the statement "calling out the dogs" can be construed as a threat of physical harm to the employees. (ALJD at 7, lines 46-48).

50. The ALJ erred in finding that the Respondent threatened the employees with physical harm due to their union support. (ALJD at 8, lines 2-3).

51. The ALJ erred in finding that the Respondent discharged the employees due to their Union support and sympathies. (ALJD at 8, lines 5-6).

52. The ALJ erred in finding that the Respondent interfered, restrained or coerced against the employees' rights under Section 7 of the Act. (ALJD at 8, lines 8-9).

53. The ALJ erred in ruling that Anthony Smidth, Nelson Rodriguez, Julio Castro, Luis Correa and Lindbergh Wallace should be reinstated within 14 days of the Order to their previous positions without any affect on their seniority. (ALJD at 8, lines 13-16).

Dated: White Plains, New York
October 25, 2011

Respectfully Submitted,

TRIVELLA & FORTE, LLP

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STATE OF NEW YORK)
)ss.:
COUNTY OF BRONX)

JULIE A. RIVERA, being duly sworn, deposes and says:

That I am not a party to this action; am over 18 years of age and reside in Bronx County, New York; that on the 25th day of October, 2011, I served a copy of the **RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE** and **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE EXCEPTIONS TO DECISION OF THE ADMINISTRATIVE LAW JUDGE** upon:

Julie Y. Rivchin, Esq.
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278-0104
Email: Julie.Rivchin@nlrb.gov

By electronic mail service (e-mail).

JULIE A. RIVERA

Sworn to before me this
25th day of October, 2011.

Notary Public
ATHENA TRUIANO
Notary Public, State of New York
No. 01TR5075427
Qualified in Westchester County
Commission Expires March 31, 2015